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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CURTIS ANDRE WILSON,

Defendant and Appellant.

E070348

(Super.Ct.No. RIF1604888)

OPINION

APPEAL from the Superior Court of Riverside County. Samuel Diaz, Jr., Judge.

Affirmed with directions.

Erica Gambale, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Michael D. Butera, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Curtis Andre Wilson guilty of one count of assault with a deadly weapon. (Pen. Code,¹ § 245, subd. (a).) Defendant admitted that he had served five prior prison terms (§ 667.5, subd. (b)), had one prior strike conviction (§§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)), and one prior serious felony conviction (§ 667, subd. (a)). A trial court sentenced him to a total term of 17 years in state prison, which consisted of the upper term of four years, doubled pursuant to the prior strike conviction; a consecutive five years for his prior serious felony conviction (§ 667, subd. (a)); and one year each for four of his prior prison terms (§ 667.5, subd. (b)). The court struck the fifth prior prison term, since it was based on the same offense as the prior serious felony enhancement.

On appeal, defendant contends the matter should be remanded for resentencing pursuant to Senate Bill No. 1393 (2017–2018 Reg. Sess.) (SB 1393). We agree. In all other respects, we affirm the judgment.

FACTUAL BACKGROUND

On the night of October 1, 2016, William H. (the victim), a mechanic, received a phone call from defendant’s wife. He had worked on her car before because he knew defendant. She was in a parking lot, having car problems again. The victim drove to the parking lot and parked next to her. She exited her car and got into his car. While the two of them spoke in the victim’s car, defendant suddenly jumped into the car and started

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

punching the victim in the face. Defendant yelled for the victim not to mess with his wife. He then yelled for his wife to get his hammer. The victim fell in between the two front seats and slid into the backseat. Defendant was on top of him, and bit down on his ear and shook his head. Defendant's wife came back to the car and handed him a gun. Defendant hit the victim in the head with it three times.

ANALYSIS

The Matter Should Be Remanded for Resentencing

On September 30, 2018, the Governor signed SB 1393 which, effective January 1, 2019, amends sections 667, subdivision (a), and 1385, subdivision (b), to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*)). Defendant contends SB 1393 applies retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing, based on a prior serious felony conviction, provided the judgment of conviction was not final when SB 1393 became effective on January 1, 2019. Thus, the matter should be remanded to the trial court to allow it to exercise its discretion to dismiss his prior serious felony enhancement, pursuant to SB 1393. The People concede that SB 1393 applies here,² but argue that remand is unnecessary. We agree with defendant.

² Both parties filed their briefs prior to January 1, 2019, the effective date of SB 1393. The People argued that defendant's claim was therefore not ripe. However, they agreed that if SB 1393 went into effect before his judgment became final, SB 1393 would apply retroactively.

We initially note the general standard for assessing when remand is required for a trial court to exercise sentencing discretion. “ “[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.]’ ” (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*)). In other words, “a remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement.” (*Ibid.*) Courts have applied this standard in the context of Senate Bill No. 620 (SB 620), which gave trial courts discretion to strike allegations subjecting a defendant to sentence enhancements under section 12022.53, where such discretion had previously been prohibited (former § 12022.53, subd. (h)). (*McDaniels*, at pp. 424-425; *People v. Chavez* (2018) 22 Cal.App.5th 663, 712-713.) We see no reason why this same standard would not apply in assessing whether to remand a case for resentencing in light of SB 1393. The People agree that authority pertaining to SB 620 is instructive.

Here, it is not clear whether or not the trial court would have stricken the prior serious felony enhancement if it had the discretion to do so. The People claim the trial court “clearly indicated, through its statements and sentencing decisions, that it would not have dismissed the enhancement[] even if it had discretion.” They stress the serious nature of the present offense and argue that the court “placed great weight on the probation report, which strongly recommended imposition of the maximum allowable

sentence.” The People also assert that the court’s remarks and decisions at sentencing clearly indicated it intended to impose the maximum sentence allowable. They point out the court repeatedly remarked that defendant had an extensive history of violence, he was on active parole at the time of the offense, and his convictions were increasing in violence. While the court did cite these aggravating factors, it did so in support of its decision to sentence defendant to the upper term on his conviction. The court went on to double the upper term pursuant to the admitted strike and then imposed the rest of the sentence pursuant to the prior serious felony and prior prison enhancements. Moreover, although the court did rely on the probation report in its sentencing, we cannot say the report “strongly recommended imposition of the maximum allowable sentence,” as the People assert. Rather, the probation report concluded that “the defendant is ineligible for probation, as such, and for the severity of the defendant’s actions, a prison sentence appears appropriate and is respectfully recommended.”

We additionally note the probation report was written at a time when the imposition of the five-year prior serious felony enhancement was mandatory. Thus, it *had* to recommend imposing this term. Furthermore, the sentencing court was not aware of the discretion it now has under SB 1393, and “ ‘[d]efendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court.’ ” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; see *id.* at pp. 1391-1392 [remand was appropriate because the record did not clearly indicate the trial court would have imposed

the same sentence had it been aware of the full scope of its discretion after a change in the law].)

In sum, we are not persuaded the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to lessen defendant's sentence. Nothing in the trial court's imposition of the sentence demonstrates what it would do with the newly afforded discretion under SB 1393. We conclude the trial court must be afforded the opportunity to exercise this sentencing discretion. (See *McDaniels*, *supra*, 22 Cal.App.5th at p. 425; *Garcia*, *supra*, 28 Cal.App.5th at pp. 973-974.)

DISPOSITION

The matter is remanded to the trial court for the limited purpose of allowing it to exercise its discretion pursuant to sections 667, subdivision (a), and 1385, as amended by SB 1393. In all other respects, the judgment is affirmed.

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McKINSTER
Acting P. J.

We concur:

SLOUGH
J.

MENETREZ
J.